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No. 94-1929

Supreme Court, U.S.
FILED
AUG 28 1995
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ALLSUP'S CONVENIENCE STORES, INC.,

Petitioner,

v.

ROBERT JOHNSEN,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New Mexico

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PETITIONER'S REPLY BRIEF

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11pp

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i
TABLE OF AUTHORITIES i
REASON FOR GRANTING THE PETITION:
The Court should grant the petition so that the published New Mexico Opinion will not disrupt the Federal Courts by misapplication of the Motor Carrier exemption to the FLSA's overtime provisions for years to come 2
CONCLUSION 7

TABLE OF AUTHORITIES

Morris v. McComb, 332 U.S. 422, 92 L.Ed. 44, 68 S.Ct. 131 (1947) 5

Southland Gasoline Co. v. Bayley, 319 U.S. 44, 87 L.Ed. 1244, 63 S.Ct. 917 (1943) 5

Martin v. Coyne Intern. Enterprises Corp., 966 F.2d 61, (CA2, 1992) 5

Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, (CA10, 1992) 7

Johnsen v. Allsup's Convenience Stores, Inc., 119 N.M. 245, 889 P.2d 853 (Ct.App. 1994); cert. den., 119 N.M. 168, 889 P.2d 203 (1995) 2

Federal Statutes:

Fair Labor Standards Act:
29 U.S.C. Section 201 2
207 2,4
213(b)(1) 4,6

Motor Carrier Act:

49 U.S.C. Section 3102 4,5

29 C.F.R. Sec. 782.2 5

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The Court should grant the Petition so that the published New Mexico Opinion will not disrupt the Federal Courts by misapplication of the Motor Carrier exemption to the FLSA's overtime provisions for years to come.

The Opinion and Orders are reprinted in full as Appendix A. The Opinion is now published as: Johnsen v. Allsup's Convenience Stores, Inc., 119 N.M. 245, 889 P.2d 853 (Ct.App. 1994); cert. den. 119 N.M. 168, 889 P.2d 203 (1995).

The New Mexico Court of Appeal's Opinion does not reflect the state of the undisputed facts presented to the trial court.

Respondent's first full paragraph (p. 2, Brief in Opposition) is misleading: Mr. Johnsen was never an hourly employee; he was hired as a maintenance person at a salaried rate of $1,800.00 per month.

Employee was salaried, not an hourly wage employee. (Trial Court's Findings of Fact, #23, 24 and 25, Appendix B-5). This is important because but for the Wage & Hour laws, Plaintiff Johnsen would be unable to argue that he is entitled to any compensation except that to which he agreed to be paid. His only remedy is through the application of the Federal Fair Labor Standards Act (FLSA), as pled. 29 U.S.C. § 201, et seq. See especially 29 U.S.C. § 207(a)(1), general overtime provision, set forth in the Answer Brief at p. 6.

The trial court made Findings of Fact based upon submissions by both parties of undisputed facts.

The trial court found as undisputed fact that Allsup's operates under the enterprise coverage of the FLSA; that Allsup's transports goods in interstate commerce by motor vehicle; that some of the goods are in interstate commerce because they are in the continuous movement of interstate commerce; that Allsup's is the owner, lessee or bailee of the motor vehicles and all the goods they transport in interstate commerce; that the goods are transported for sale or to further a commercial enterprise; that Allsup's has employees who are regulated by the U.S. Dept. of Transportation; that Mr. Johnsen drove a truck for Allsup's on the public highways each week, as a more than incidental part of his duties; that Mr. Johnsen received parts shipped from outside the State of New Mexico and transported them to their pre-designated final destination in New Mexico; that Mr. Johnsen was expected to transport goods in interstate commerce; that Mr. Johnsen was a salaried employee throughout his period of employment with Allsup's; and that the U.S. Dept. of Labor, Wage & Hour Division, wrote Mr. Johnsen a letter stating his employment was exempt under Section 13(b)(1) of the Fair Labor Standards Act!

Further, the Wage & Hour expert giving an affidavit for Allsup's, further supported by the Wage & Hour determination, states:

"15. My advice to Allsup's that the maintenance persons are exempt from the Fair Labor Standards Act under Section 13(b)(1) is based on the maintenance persons, as a regular part of their duties, transport parts on the final leg of interstate journeys, i.e., they transport parts and those parts are in the continuous movement of goods in interstate transportation."

The trial court concluded that Allsup's is a "motor private carrier," as the term is defined by the Transportation Code's Motor Carrier Safety Act (MCA), 49 U.S.C. § 3101, et seq.

Pursuant to the MCA, the Secretary of Transportation had the power to establish qualifications and maximum hours of service for Mr. Johnsen during his employment with Allsup's.

So long as the Secretary has the power to establish such qualifications and hours, the FLSA exempts the carrier (Allsup's) from the operation of § 207, supra:

> "The provisions of section 207 of this title shall not apply with respect to--
>
> (1) Any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49 (recodified as 49 U.S.C. § 3102)." 29 U.S.C. § 213(b)(1). (emphasis added)

By merely saying that the "employee's duties do not affect the safety of operation of motor vehicles," the restated "Question Presented" in the Brief in Opposition (p. i) simply misstates the facts and the law of this case.

It is not necessary that the Secretary actually exercise the power in a particular situation. 49 U.S.C. § 3102. Morris v. McComb, 332 U.S. 422, 92 L.Ed. 44, 68 S.Ct. 131 (1947); Southland Gasoline Co. v. Bayley, 319 U.S. 44, 87 L.Ed. 1244, 63 S.Ct. 917 (1943); Martin v. Coyne Intern. Enterprises Corp., 966 F.2d 61 (CA2, 1992).

In addition, Department of Transportation regulations apply to employees who could have, in the regular course of their employment, been reasonably expected to make one of the carrier's interstate runs. Both the Respondent and the New Mexico appellate courts either failed or refused to address 29 C.F.R. 782.2:

> "In determining whether an employee falls within such an exempt category, neither the name given to his position nor that given to the work that he does is controlling."
>
> "As a general rule, if the bona fide duties of the job performed by the employee are in fact such that he is . . . called upon in the ordinary course of his work to perform, either regularly or from time to time, safety-affecting activities of the character described in paragraph (b2) of this section, he comes within the exemption in all workweeks when he is employed at such job."
>
> 29 C.F.R. § 782.2(b)(2) and (3).

Under the facts of the case, in order to establish the exemption under 29 U.S.C. § 213(b)(1), Allsup's has only to show:

1. Plaintiff's work is covered by the FLSA (pled);
2. Allsup's is a motor carrier (not disputed);
3. Plaintiff was a "driver," (Appendix A-10);
4. Plaintiffs's work while employed at Allsup's affected the safety of operations of interstate transportation; and
5. Plaintiff transported some goods or property which were in interstate commerce.

So, given that items 1, 2 and 3 are met, the emphasis is next on SAFETY:

The employee here, Mr. Johnsen, drove every day of his employment, if not at least during every week, on the public highways. Trial Court Finding #12, Appendix B-3.

The Respondent is incorrect in stating that the Petition refers only to "interstate highways," rather than public highways. (Brief in Opposition, p.4)

The Opinion, to be sure, points out the purpose of the exemption, to allow the Secretary of Transportation to regulate the safety of interstate commerce on public highways (not just interstates). But the emphasis is wrong. Because of the importance of safety, it takes very little interstate commerce to activate the exemption. This is the whole point of Morris v. McComb, supra.

The Opinion (Appendix A) neglects to emphasize that Mr. Johnsen drove an Allsup's leased or owned truck on the public highways each week. Trial Court Finding #12, Appendix B-3.

There is no question of material fact with regard to the safety application of Mr. Johnsen's duties: his driving a truck on the public highways was more than an incidental part of his duties.

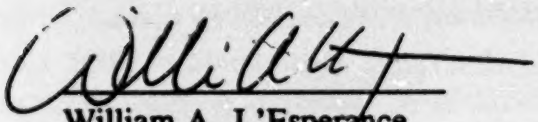
There is no question of material fact with regard to the existence of some interstate activity in Mr. Johnsen's duties: his transporting of goods was more than an incidental part of his duties. Appendix B-7.

The New Mexico Court of Appeals' Opinion, if left as is, by contravening established Federal Law, will fester and severely impact the economy, not only of Petitioner, one of the largest private employers in New Mexico, but of vast numbers of companies doing business in the United States. Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1025 (CA10 1992).

CONCLUSION

The trial court entered Summary Judgment on behalf of Allsup's because it is exempt from the FLSA, as a matter of law. For the reasons stated, the Writ should issue.

RESPECTFULLY SUBMITTED:



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